to hold until the next general election for circuit judges, and that interval was less than the constitutional term of circuit judge, it was nevertheless held that his successor might be chosen at such election, on the ground that he had not been chosen for the regular term but to fill a vacancy. *State* v. *Askew* (above). *State* v. *Thoman,* 10 Kan. 191, permits the prior incumbent to hold for his full constitutional term. *People* v. *Knopf* (above) takes a third position and overthrows the law altogether because it attempts to provide for the election of a judge for a term less than the constitutional one.

EVIDENCE—PERSONAL INJURY—PHYSICAL EXAMINATION OF PLAINTIFF.—In an action for damages for personal injuries, it was *Held,* that plaintiff could not be compelled to submit to a physical examination. *May* v. *Northern Pac. Ry. Co.* (1905), — Mont. —, 81 Pac. Rep. 328.

This comparatively new question has given rise to conflicting opinions. The undoubted weight of authority is opposed to the above view. I MICH. LAW REVIEW, pp. 193, 277; II Id., p. 321; III Id., 160; where the cases are reviewed. The Oklahoma court agrees with the Montana decision but justifies it on the ground that the holdings of the Supreme Court of the United States are binding on the territorial court, and cites *Union Pac. Ry. Co.* v. *Botsford,* 141 U. S. 250, which is in accord, but with two justices dissenting. *City of Kingfisher* v. *Altizer,* 13 Okl. 121. In the large number of states where the opposing view is held, the right of defendant is not considered absolute but rests in the discretion of the trial court. *Graves* v. *City of Battle Creek,* 95 Mich. 266.

EVIDENCE—PHYSICAL EXAMINATION OF ACCUSED.—The trial court refused to compel accused to submit to a measurement of his foot. *Held,* that accused could not be compelled to submit to such a measurement. *Bridges* v. *State* (1905), — Miss. —, 38 So. Rep. 679.

No cases are cited. Decisions are not in accord as to the trial court's authority in such a case. It has been held that it is discretionary with the court whether accused should be compelled to make tracks in sawdust on the court room floor. *Campbell* v. *State,* 55 Ala. 80; that accused could be compelled to have his feet measured to see if he could wear a certain kind of boots. This was held a legitimate way of cross-examining him since he had made efforts on direct examination to get the boots on. *State* v. *Nordstrom,* 7 Wash. 506. In one of the most extreme cases under this view, accused was compelled to bare his arm to disclose certain tattooing, when his identity was in question. *State* v. *Ah Chuey,* 14 Nev. 79. But it has been held that accused could not be compelled to make footprints for comparison. *Day* v. *State,* 63 Ga. 667; *Stokes* v. *State,* 5 Baxt. (Tenn.) 619. Refusal of accused when arrested to make tracks in the hall, with the promise that if they did not correspond with tracks made by a burglar, he would be released, could not be used against him. *Cooper* v. *State,* 86 Ala. 610. Accused in burglary case cannot be compelled to have his foot measured or try on a shoe. *People* v. *Mead,* 50 Mich. 228. But in cases where it is

held that examination may be compelled, it rests in the discretion of the trial court and will not be reviewed unless grossly erroneous.

EVIDENCE—PRIVILEGED COMMUNICATION—COUNTY ATTORNEY.—In an action for malicious prosecution, the testimony of the county attorney, as to the statements which caused the indictment of plaintiff, made to him by defendant, was *held* inadmissible, because a privileged communication. *Gabriel* v. *McMullin* (1905), — Ia. —, 103 N. W. Rep. 355.

Whether in such a case the relation of attorney and client exists, the cases are in conflict. The Code of Iowa (§ 3643) provides that "no practicing attorney * * * shall be allowed in giving testimony to disclose any confidential communication properly entrusted to him in his professional capacity." It will be seen that the above decision was justified under the statute, even though the relation of attorney and client did not exist. This veiw was taken by the same court in *State* v. *Houseworth,* 91 Iowa 740, where the statute was held broad enough to cover such a case. Upon practically the same state of facts, it was held that the relation of attorney and client did exist, that the prosecuting attorney was defendant's attorney for the time being, and that the communication was privileged. *Oliver* v. *Pate,* 43 Ind. 132. In *Vogel* v. *Gruaz,* 110 U. S. 311, the same view was taken, the court saying that the person consulted the prosecuting attorney, just as he would consult any other attorney, to ascertain if the facts stated were sufficient to justify prosecution. The fact that nothing was paid for the advice made no difference. This decision was also placed on the ground of an informer's privilege. On the other hand, *Cole* v. *Andrews,* 74 Minn. 93 held that in such a case the relation of attorney and client did not exist, that the communication was not privileged, and that the statute providing that "a public officer cannot be examined as to communications," etc., did not apply. In *Granger* v. *Warrington,* 8 Ill. 299, such a communication was declared not privileged, as the relation of attorney and client did not exist, and that no considerations of public policy so required. In some cases such communications are held privileged on the principle of informers and government officers. This reasoning is indicated and partially relied on in *Oliver* v. *Pate, Vogel* v. *Gruaz,* supra. The distinction should be noted that in such a case the privilege is that of the government, not of the person making the statement.

EXECUTION—PREMATURE—COLLATERAL ATTACK.—Execution was issued by consent of defendant within twenty-four hours after entry of judgment, on it defendant was arrested and imprisoned, and in an action by the creditor against the surety on the recognizance of the defendant as a poor debtor, *Held,* that the surety might defend the action by showing that the execution was prematurely issued, and in contravention of the statute forbidding execution to issue within twenty-four hours after entry of judgment; and that while the court might, the clerk could not, issue such execution on consent of defendant. *Washington National Bank* v. *Williams* (1905), 188 Mass. 103, 74 N. E. 470.